

# **DISADVANTAGED BUSINESS ENTERPRISE PROGRAM ADMINISTRATION MANUAL**

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Prepared by  
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# DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

## North Dakota Department of Transportation

### DEFINITIONS (§26.5)

Any definition whereby the key word is in quotation marks is an original definition by the Department. All other key words are defined as per the regulation.

**Affiliation** has the same meaning the term has in the Small Business Administration (SBA) regulations, 13 CFR Part 121.

- (1) Except as otherwise provided in 13 CFR Part 121, concerns are affiliates of each other when, either directly or indirectly:
  - (i) One concern controls or has the power to control the other; or
  - (ii) A third party or parties controls or has the power to control both; or
  - (iii) An identity of interest between or among parties exists such that affiliation may be found.
- (2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

**Alaska Native** means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

**Alaska Native Corporation (ANC)** means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, et seq.).

**"Compliance"** means that a recipient has correctly implemented the requirements of 49 CFR Part 26.

**Contract** means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them. For purposes of 49 CFR Part 26, a lease is considered to be a contract.

**Contractor** means one who participates, through a contract or subcontract (at any tier), in a USDOT-assisted highway, transit, or airport program.

**"Contractor"** means ALL DBE (including MBE and WBE) and non-DBE firms, including prime

contractors, subcontractors, suppliers, brokers, vendors, regular dealers, and manufacturers.

**"Department"** means the North Dakota Department of Transportation.

**Disadvantaged business enterprise or DBE** means a for-profit small business concern --

- (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and
- (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

**Good faith efforts** mean efforts to achieve a DBE goal or other requirement of 49 CFR Part 26 which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

**Immediate family member** means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

**Indian tribe** means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See also definition of "tribally-owned concern."

**Joint venture** means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

**Native Hawaiian** means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

**Native Hawaiian Organization** means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

**Noncompliance** means that a recipient has not correctly implemented the requirements of 49 CFR Part 26.

**Operating Administration or OA** means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

**Personal net worth** means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's

ownership interest in an applicant or participating DBE firm or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

**Primary industry classification** means the North American Industrial Classification System (NAICS) designation which best describes the primary business of a firm. The NAICS is described in the *North American Industry Classification Manual - United States, 1977* which is available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161: by calling 1(800)553-6847; or via the Internet at: <http://www.ntis.gov/product/naics.htm>.

**Primary recipient** means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

**Principal place of business** means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

**Program** means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which 49 CFR Part 26 applies.

**Race-conscious measure or program** is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

**Race-neutral measure or program** is one that is, or can be, used to assist all small businesses. For the purposes of 49 CFR Part 26, race-neutral includes gender-neutrality.

**Recipient** is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

**Secretary** means the Secretary of Transportation or his/her designee.

**Set-aside** means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

**Small Business Administration or SBA** means the United States Small Business Administration.

**SBA certified firm** refers to firms that have a current, valid certification from or recognized by the SBA under the 8(a) BD or SBD programs.

**Small business concern** means, with respect to firms seeking to participate as DBEs in USDOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in §26.65(b).

**Socially and economically disadvantaged individual** means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is --

- (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.
- (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
  - (i) **"Black Americans,"** which includes persons having origins in any of the Black racial groups of Africa;
  - (ii) **"Hispanic Americans,"** which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
  - (iii) **"Native Americans,"** which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;
  - (iv) **"Asian-Pacific Americans,"** which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;
  - (v) **"Subcontinent Asian Americans,"** which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
  - (vi) **Women;**
  - (vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

***Tribally-owned concern*** means any concern at least 51 percent owned by an Indian tribe as defined in this section.

***USDOT-assisted contract*** means any contract between a recipient and a contractor (at any tier) funded in whole or in part with USDOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

***USDOT*** means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

***USDOT/SBA Memorandum of Understanding or MOU***, refers to the agreement signed on November 23, 1999, between the Department of Transportation (DOT) and the Small Business Administration (SBA) streamlining certification procedures for participation in SBA's 8(a) Business Development (8(a) DB) and Small Disadvantaged Business (SDB) programs, and USDOT's Disadvantaged Business Enterprise (DBE) program for small and disadvantaged businesses.

## **NONDISCRIMINATION (§26.7)**

The Department will not exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against any person in connection with the award and performance of any contract covered by 49 CFR Part 26 on the basis of race, color, sex, or national origin.

In administering its DBE program, the Department will not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the DBE program with respect to individuals of a particular race, color, sex, or national origin.

## **INFORMATION COLLECTION AND REPORTING (§26.11)**

### **Bidders List**

The Department will create a bidders list consisting of information about all DBE and non-DBE firms that bid or quote on USDOT-assisted contracts. The purpose of this requirement is to allow use of the bidder's list approach to aid in the calculation of our overall annual goal.

The DBE special provisions (**Attachment A and B**), revised January 10, 2005, require each bidder to provide the Department copies of **all** quotes they received for each project within 10 days after each bid opening. The DBE race-conscious special provision also requires suppliers, subcontractors, vendors, manufacturers, and regular dealers to submit copies of **all** their quotes to the Department the night before each bid opening. From this information a bidders list will be developed which will count all firms that are participating, or attempting to participate, on USDOT-assisted contracts. The list will include all firms that bid on prime contracts or quote subcontracts on USDOT-assisted projects, including both DBEs and non-DBEs.

During the consultant interviewing process consultants will be asked to provide the types of work and the names of potential subcontractors they might subcontract to should they be awarded the contract.

From these sources the Department will collect the following information from these bids or quotes:

- Firm name
- Firm address
- Firm's status as a DBE or non-DBE

All firms whose names are gathered by the above processes will be queried by a bidders list survey (**Attachment C**) to determine the following:

- The age of the firm and
- The annual gross receipts of the firm.

### **Maintaining Records and Tracking Payments**

The Department will require prime contractors, subcontractors, consultants, and subconsultants to maintain records and documents of payments to DBEs for three years following the performance of the contract. These records will be made available for inspection, upon request, by any authorized representative of the Department or USDOT. This reporting requirement also applies to any certified DBE.

Prime contractors and subcontractors must keep a running tally of actual payments to DBEs for work committed to them at any time during the life of the contract. Prime contractors and subcontractors will be required to complete the Record of DBE Project Payments (SFN 53664) (**Attachment D**) on a quarterly basis.

Consultants and subconsultants must keep a running tally of actual payments to DBEs and non-DBE's for work performed during the life of a contract. Consultants and subconsultants will be required to complete the "Record of Consultant Project Payments, (SFN 54428) (**Attachment E**) on a semi-annual basis.

These forms must be submitted to the Department by the tenth working day after the October-December quarter, the tenth working day after the January-March quarter, the tenth working day after the April-June quarter, and the tenth working day after the July-September quarter. The form must contain the name of the prime contractors, subcontractors, consultants, and subconsultants, the DBE and non-DBE firm's name, the project number, the bid opening date, the amount paid, and the date of payment to the DBE or non-DBE for the reporting period only. Send the form to the DBE Liaison Officer, North Dakota Department of Transportation, 608 E. Boulevard Ave., Bismarck, ND 58505-0700.

The Department may perform interim audits of contract payments to DBEs to ensure that the actual amount paid to DBEs equals or exceeds the dollar amount stated on Form C.

### **Reporting To USDOT**

The Department will report DBE participation to USDOT (FHWA and FTA) semi-annually, using USDOT form, Uniform Report of DBE Awards or Commitments and Payments.

### **ASSURANCES (§26.13)**

The Director has signed the following assurance, applicable to all USDOT-assisted contracts and their administration:

*The Department shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any USDOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR Part 26. The Department shall take all necessary and reasonable steps under 49 CFR Part 26 to ensure nondiscrimination in the award and administration of USDOT-assisted contracts. The Department's DBE program, as required by 49 CFR Part 26 and as approved by USDOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the Department of its failure to carry out its approved program, the USDOT may impose sanctions as provided for under Part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 et seq.).*

The Department will ensure that the following clause is placed in every USDOT-assisted contract and subcontract:

*The contractor or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable*

*requirements of 49 CFR Part 26 in the award and administration of USDOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.*

### **DBE PROGRAM UPDATE (§26.21)**

The Department will continue to carry out this program until it has spent all available funds from USDOT. The Department will keep USDOT informed about significant program changes.

### **POLICY STATEMENT (§26.23)**

The North Dakota Department of Transportation (Department) has established a Disadvantaged Business Enterprise (DBE) program in accordance with regulations of the U.S. Department of Transportation (USDOT), 49 CFR Parts 23 and 26. The Department receives federal financial assistance from USDOT. As a condition of receiving this assistance, the Department has signed an assurance that it will comply with 49 CFR Parts 23 and 26.

The DBE requirements of 49 CFR Parts 23 and 26 and the Department's DBE program apply to all federally-aided highway construction contracts and to any assignments made to subcontractors, subconsultants or recipients. The Department, its subrecipients, contractors, subcontractors, consultants, and subconsultants shall not discriminate on the basis of race, color, sex, age, national origin, and handicap or disability.

It is Department policy to ensure that DBEs, as defined in 49 CFR Parts 23 and 26, have an equal opportunity to receive and participate in USDOT-assisted contracts. It is also Department policy:

- To ensure nondiscrimination in the award and administration of USDOT-assisted contracts
- To create a "level playing field" in which DBEs can compete fairly for USDOT-assisted contracts
- To ensure that the DBE program is narrowly tailored in accordance with applicable law
- To ensure that only firms fully meeting 49 CFR Parts 23 and 26 eligibility standards are permitted to participate as DBEs
- To help remove barriers to the participation of DBEs in USDOT-assisted contracts
- To assist the development of firms that can compete successfully in the marketplace outside the DBE program
- To provide appropriate flexibility to recipients of federal financial assistance in establishing and providing opportunities for DBEs

The Department will disseminate the policy to all Department staff and to DBE and non-DBE customers in the DBE Program. We will use the following methods to disseminate the policy:

- Send it to all DBE and non-DBE firms on the Department's bidders list
- Publish it in the supportive services newsletter annually
- Publish it on the Department DBE bid information web site at <http://www.state.nd.us/dot/dbebidinfo.html>

Each subrecipient, contractor, subcontractor, consultant, or subconsultant that fails to carry out



the requirements set forth in 49 CFR Parts 23 and 26 may constitute a breach of contract, and after notification by the Department, may result in termination of the agreement or contract, or such remedy as the Department deems appropriate.

I, as the Department Director, am charged with the overall responsibility for assuring compliance with 49 CFR Parts 23 and 26, including DBE programs delegated to subrecipients such as Metropolitan Planning Organizations and other political subdivisions. I have appointed the Civil Rights Officer III as the DBE Liaison Officer for the Department. The DBE Liaison Officer is responsible for developing, coordinating, and monitoring the implementation of the Department's DBE program on a day-to-day basis. Division Directors and District Engineers are responsible for carrying out applicable facets of the DBE program with their areas.

Deb Igoe is the Department's DBE Liaison Officer. She is responsible for implementing all aspects of the DBE program. Implementation of the DBE program has the same priority as compliance with all other legal obligations incurred by the Department in its financial assistance agreements with USDOT.

  
\_\_\_\_\_  
NDDOT Director

September 21, 2005  
\_\_\_\_\_  
Date

#### **DBE LIAISON OFFICER (§26.25)**

The Director has designated Deb Igoe as the Department DBE Liaison Officer. Ms. Igoe can be contacted at the Civil Rights Office, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, or digoe@state.nd.us, phone (701) 328-2576, cell (701) 527-8834, or fax (701) 328-1965. She is responsible for implementing all aspects of the DBE program and ensuring that the Department complies with all provisions of 49 CFR Parts 23 and 26. Ms. Igoe has direct, independent access to the Director concerning DBE program matters. An organization chart displaying the DBE Liaison Officer's position in the organization is found in **Attachment F** to this program.

The DBE Liaison Officer is responsible for developing, implementing, and monitoring the DBE program, in coordination with other Department staff, on a day-to-day basis. Duties and responsibilities include, but are not limited to:

- With appropriate Department staff, developing the Department's DBE program
- Coordinating the program with all applicable Department employees, contractors, subcontractors, consultants, subconsultants, minority and women's interest groups, and other appropriate public and private agencies
- Monitoring the implementation of all facets of the Department's DBE program
- Collecting and analyzing pertinent data received regarding program participation
- Monitoring Department progress toward achieving its overall annual goal, and the effectiveness of the DBE program
- Providing technical assistance and training to Department personnel, DBE firms, contractors, and subcontractors
- Disseminating program information to DBE firms regarding contracting opportunities
- Developing annual DBE supportive services work statement, request for proposal, and contract
- As contracting officer for the DBE supportive services contract, monitor its

- implementation and meet periodically with the contractor
- Providing program reports as required by the Federal Highway Administration
- Chairing the DBE Unified Certification Board, the DBE Participation Review Committee, the DBE Goal Setting Committee, and the Liaison Committee
- Reporting regularly to the Director on the progress and achievements of the program
- Identifying problems or deficiencies and making recommendations for improvement or change
- Monitoring national best practices and using the information to upgrade the DBE program
- Building support for the program within the Department and the industry
- Maintaining communication to help resolve issues and increase program effectiveness

The DBE Liaison Officer has a staff of two Civil Rights Officer IIs (CROII) and an Administrative Assistant II assigned to the DBE program as part of their duties. One CROII is a member of the DBE Unified Certification Board, the DBE Goal Setting Committee, and DBE Participation Review Committee. The other CROII analyzes the DBE participation and good faith effort documentation of contractors as required by the DBE race-neutral and DBE race-conscious special provisions, and presents a step-by-step summation to the DBE Participation Review Committee. Both CROII's can process DBE applications, compile data for the DBE Directory, update the DBE Roster, conduct DBE project site and home office reviews, conduct and write the annual review of the supportive services contractor, and prepare statistical data for various reports. The Administrative Assistant II gathers data relative to DBE goal setting, DBE participation, the bidders list, and good faith efforts review.

Division Directors and District Engineers are responsible for carrying out all facets of the DBE program within their respective areas. They ensure appropriate division or district personnel are familiar with the requirements of 49 CFR Parts 23 and 26, the Department's DBE Program Administration Manual, and the specific division's or district's responsibilities relative to the program. The Division Directors and District Engineers (or their designees) meet periodically with the DBE Liaison Officer to evaluate the progress and achievements of the program and to identify program problems or deficiencies. The DBE Liaison Officer makes recommendations to the director concerning necessary program changes and improvements.

The Program Administrator for the FTA Elderly and Persons with Disabilities assistance program and the Rural Public Transportation assistance program (Sections 5310 and 5311 respectively) is responsible for and will ensure that appropriate DBE requirements are included in all relevant transit documents, such as program guidelines, grant applications, and specifications for bus and equipment purchases.

### **DBE Unified Certification Board**

The DBE Unified Certification Board is made up of any three of the following members:

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Shawn Barney, Transportation Senior Manager, Construction Services Division
- Lynn Shannon-Gall, Account Technician II, Financial Management Division
- Jackie Lipp, Civil Rights Officer II, Civil Rights Office
- Greg Kolden, Transportation Senior Manager, Construction Services Division
- Mark Holzer, Aviation Planner, North Dakota Aeronautics Commission

Advisors to the DBE Unified Certification Board are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee

The recording secretary is Marlene Larson, Civil Rights Officer II, Civil Rights Office.

### **DBE Participation Review Committee**

The DBE Participation Review Committee is made up of any three of the following members.

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Shannon Sauer, Division Director, Financial Management Division
- Shawn Barney, Transportation Senior Manager, Construction Services Division
- Jackie Lipp, Civil Rights Officer II, Civil Rights Office
- Greg Kolden, Transportation Senior Manager, Construction Services Division

Advisors to the DBE Participation Review Committee are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee

The presenter who reviews, analyzes, compiles, and presents data, and prepares the DBE Participation Review form is Marlene Larson, Civil Rights Officer II, Civil Rights Office. Statistical analysis of quotes is provided to the DBE Participation Review Committee by various engineers from a variety of divisions of the Department.

### **DBE Project Goal Setting Committee**

The DBE Project Goal Setting Committee is made up of the following members:

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Greg Kolden, Transportation Senior Manager, Construction Services Division
- Roger Weigel, Assistant Design Engineer, Design Division
- Errol Behm, Transportation Senior Manager, Local Government Division
- Shawn Barney, Transportation Senior Manager, Construction Services Division

Advisors to the DBE Project Goal Setting Committee are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee

## **DBE FINANCIAL INSTITUTIONS (\$26.27)**

It is department policy to investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in the community,

and to encourage prime contractors on USDOT-assisted contracts to make use of these institutions.

To determine which financial institutions are owned and controlled by socially and economically disadvantaged individuals, the Department contacted the following organizations:

- North Dakota Bankers Association
- North Dakota Department of Banking and Financial Institutions, and
- Independent Bankers Association

To date, no such institution has been identified.

### **PROMPT PAYMENT (§26.29)**

The Department will include the following clauses, which apply to both DBE and non-DBEs, in each USDOT-assisted prime contract (**Attachment G**).

The prime contractor must pay the subcontractor the amount due for work done or services rendered, less applicable retainage not to exceed 5%, from the current progress payment within 20 calendar days of receipt of payment from the department or owning agency, unless the prime contractor has just cause to not make payment. If the prime contractor withholds payment from the subcontractor, the prime contractor must **immediately notify** the subcontractor and the project engineer, in writing, the reasons for withholding payment. The subcontractor may also notify the engineer if prompt payment has not been made.

If the Department or owning agency determines the prime contractor is withholding payment without just cause, interest will accrue at the rate provided by NDCC §§13-01.1-02. The prime contractor is responsible for paying the accrued interest starting on the 21<sup>st</sup> calendar day after the prime contractor receives payment. If the prime contractor is withholding subcontractor payments without just cause the department or owning agency may, suspend all payments due to the prime contractor, until the subcontractor is properly paid and the contractor agrees to make payments as specified. If the department or owning agency determines there is just cause for withholding payment, interest will not accrue on the amount due.

These prompt payment procedures apply to all tiers of subcontracts and are based on 49 CFR Part 26.29.

### **Retainage**

If the prime contractor elects to use retainage on subcontract work, prompt payment shall also include the release of retainage monies that have been withheld from the subcontractor, within 20 days after the subcontractor's work is satisfactorily completed. Non-bonded subcontractors must submit proof of payment for all material bills and wages to the prime contractor before the prime contractor is required to pay the retainage. If retainage is not released as per this provision, interest will accrue at the rate provided by NDCC §§13-01.1-02 beginning the 21<sup>st</sup> calendar day after the subcontractor's work is satisfactorily completed.

The Department or owning agency will determine whether the subcontractor's work has been "satisfactorily completed." A subcontractor's work is satisfactorily completed when all of the tasks called for in the subcontract have been accomplished, documented in accordance with the contract, and paid for on a pay estimate. To be satisfactorily complete a subcontractor must

provide all necessary final documentation required in the contract. Final documentation may include, but is not limited to: certified payrolls, materials certification, haul road releases, pit receipts of payment, pit releases, night watchman reports, warranties, operating manuals, product literature, and verification of final quantities, and the DBE Participation Certification (SFN 14268).

The release of retainage applies to all tiers of subcontracts.

### **No Circumvention**

On federal-aid contracts the contractor shall not include any provision in its subcontract that would circumvent 49 CFR Part 26.29.

### **Sanctions**

If a prime contractor does not pay the subcontractor in a timely manner, or have the disadvantaged business enterprise perform the specified dollar amount of work (subject to plan quantity changes), or fulfill the requirements of the DBE special provisions, the Department will take certain actions. After determining that any one of these requirements has not been met, the Department will provide written notice that the prime contractor has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing. If a written request is not received, or if the prime contractor does not provide sufficient evidence at the hearing that the provisions have been met, the Department may:

- Withhold the prime contractor's progress payment until the prime contractor complies with all DBE special provisions
- Deduct, from the prime contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the prime contractor
- Find the prime contractor in default
- Disallow the prime contractor to bid in one or more scheduled bid openings after the date the sanction is imposed
- Other corrective action determined by the Department to be appropriate, or
- Any combination of the above.

### **DBE DIRECTORY (§26.31, §26.81)**

Under the Department's unified certification program (UCP), the Department's Civil Rights Office maintains a DBE Directory (**Attachment H**) identifying all firms certified as DBEs under the UCP. The Directory lists the firm's name, owner's name, address, phone number, type of DBE designation, year formed, whether bonded, whether insured, area of work, labor force, equipment, and the type of work the DBE firm has been certified to perform.

The Directory is published in hard copy and distributed on January 1 of each year. It is also located on our Department website at: [www.state.nd.us/dot/bidinfo.html](http://www.state.nd.us/dot/bidinfo.html). The electronic version is updated by including additions, deletions, and other changes as they are made, approximately 9-10 times per year.

The Directory is made available, electronically or by hardcopy, to all DBE and non-DBE prime contractors, subcontractors, consultants, subconsultants, suppliers, vendors, manufacturers, regular dealers, county, city, and consulting engineers, tribal organizations, other minority and women's interest groups, Department staff, other state and federal agencies, and anyone else

requesting it.

The Department also publishes a DBE Roster (**Attachment I**) thirty days prior to each bid opening. An update to the DBE Roster is available 5 days before each bid opening. Both the Directory and the Roster are also located on the Department's web page on the Internet at [www.state.nd.us/dot/bidinfo.html](http://www.state.nd.us/dot/bidinfo.html). Copies of the DBE Roster are included in each qualified bidder's package.

### **OVERCONCENTRATION (§26.33)**

The Department is not aware of overconcentration in any work area. However, any firm working for, or attempting to seek work with, the Department that feels its opportunity to participate in a federal aid contract has been unduly burdened because of an overconcentration of DBE firms in a specific type of work may file a complaint with the Department. The complaint must include examples of how the firm's opportunity to obtain work has been impaired, and the name(s) of DBE firms that have affected their ability to obtain work with the Department. The Department will review all pertinent records, and, if necessary, solicit additional information from other contractors and DBE firms to determine if the burden is a result of overconcentration. Any determination of overconcentration and subsequent remedy will be reviewed and approved by FHWA to ensure that changes do not result in disparate treatment.

Should a determination be made that DBEs are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work the Department will devise appropriate measures to address this overconcentration.

### **MONITORING AND ENFORCEMENT MECHANISMS (§26.37)**

#### **By The Department's Civil Rights Office**

Copies of approved Prime Contractor's Request to Sublet (SFN 5682) (**Attachment J**) and DBE Participation Certification (SFN 14268) (**Attachment K**) are forwarded to the Civil Rights Office by each district. As these forms are received, they are compared with the DBE commitments and/or the good faith efforts documentation for each project. The DBE Liaison Officer brings any noted discrepancies to the attention of the Construction Services Division, which works with the Project Manager or Project Engineer to resolve the issue.

Annually, projects are selected for in-depth EEO and DBE contract compliance reviews. Part of the on-site review is to verify the contractor's performance regarding the DBE race-neutral and DBE race-conscious special provisions. The review may also include interviews with Department or other owning agency, contractor, and DBE project personnel and an inspection of any statistical or documentary materials relevant to the contractor's performance.

#### **On-Site Project Monitoring By Project Manager or Project Engineer**

Project Managers or Project Engineers, along with the Project Coordinators or Assistant District Engineers for Construction, in each district, verify the amount of DBE work performed by DBEs on the project. This is accomplished by comparing the monetary and materials amounts shown on Prime Contractor's Request to Sublet forms with the DBE commitments or GFE documents provided by the Civil Rights Office. Any discrepancies found between these two documents are addressed with the prime contractor. Any issues not resolved must be reported to the Construction Services Division for resolution.

DBE items discussed at the pre-job conferences include:

- Participating DBEs and the work they are to perform
- Time period for the work to be performed
- Prompt payment and retainage (both DBE's and non-DBE's)
- DBE race-conscious special provision (default by prime or DBE)
- Leasing or renting of equipment; and
- DBE's line of communication for raising issues or concerns.

Activities and procedures monitored by the Project Manager or Project Engineer include:

- Signed Prime Contractor's Request to Sublet (SFN 5682)
- DBE firm's equipment and work force
- Item(s) of work to be performed
- Leased or rented equipment and required agreements
- DBE supervision on the project
- Employee sharing between DBE firms and prime contractors or other subcontractors
- Payrolls
- Pay estimates for subcontracted work items
- Prompt payment and retainage complaints
- DBE race-neutral and DBE race-conscious special provision compliance by prime contractors, subcontractors, and DBEs; and
- Completion of the DBE Participation Certification form (SFN-14268).

Proper documentation concerning the above items is made and kept in project records and diaries. The Project Manager or Project Engineer immediately notifies the DBE Liaison Officer of:

- Questions concerning discrimination of any kind; and
- Labor compliance issues.

The DBE Liaison Officer will address these issues.

### **Resolution Of Nondiscriminatory DBE Issues And Concerns**

Issues and concerns raised by DBEs and contractors during the life of the project are brought to the attention of the Project Manager or Project Engineer. If the Project Manager or Project Engineer is unable to resolve the issue at the project site, she or he contacts the Assistant District Engineer or Construction Coordinator. If the Assistant District Engineer or Construction Coordinator is unable to resolve the issue, she or he contacts the Construction Services Division. The Construction Services Division and the DBE Liaison Officer meet as needed during the construction season to review any DBE issues that have not been resolved at a lower level.

The procedures for resolving nondiscriminatory DBE issues and concerns which were not resolved at the district level are as follows:

1. The party making a complaint provides written notice to the Project Manager or Project Engineer, which must include:

- A. A statement concerning the nature of complaint
  - B. The name of the person or company against whom the complaint is being filed
  - C. The date the complaint occurred
  - D. The projects where the complaint occurred; and
  - E. The name of the person filing the complaint.
2. The Project Manager or Project Engineer notifies the District Engineer and the Construction Services Division of the complaint. The Construction Services Division notifies the DBE Liaison Officer, who notifies the Federal Highway Administration.
  3. Oral complaints are accepted, but are not formally acted upon until a written notice of complaint is received.
    - A. If the complaint is incomplete, the person filing the complaint is asked to provide additional information.
    - B. If the complaint is complete, it is categorized by the DBE Liaison Officer as:
      - (1) A contract administration issue when it involves:
        - a. A commercially useful function (work performed, materials, personnel, or equipment)
        - b. Honoring commitment to DBE
        - c. Honoring commitment to contractor
        - d. DBE substitution
        - e. Good faith efforts
        - f. Timely payment to a DBE or non-DBE subcontractor; or
        - g. Default by DBE or contractor.
      - (2) A Title VI issue if the individual filing the complaint feels he or she has been discriminated against. The individual will then be instructed to follow the Title VI complaint process (**Attachment L**).
      - (3) Other.
  4. The complaint is forwarded to the person against whom the complaint was filed for her or his review and reply.
  5. A review team consisting of Department staff from the Civil Rights Office and Construction Services Division is assembled. The review team is headed by the Construction Services Division when the issue concerns contract administration, and by the DBE Liaison Officer when the issue concerns discrimination, excluding Title VI issues. Title VI issues will be investigated by FHWA. The Department may also request an informal hearing between the affected parties.
  6. The review team defines the issues, identifies applicable laws, procedures, contract requirements, etc., that may have been violated, and determines if the alleged complaint is supported by the facts.
  7. The review team makes a recommendation to the Director, for corrective action to be taken or for sanctions against either party to be invoked.



8. Both parties are notified of the proposed corrective action or sanctions and of their right to request a hearing. They are given 14 calendar days in which to request a hearing. If a hearing is requested, the hearing is held before the Deputy Director for Engineering. Only new information or specific arguments not previously heard by the review team may be presented. The hearing is recorded.
9. After the hearing, or if no hearing is requested, the Deputy Director for Engineering makes a final recommendation to the Director, for the corrective action to be taken or sanctions to be invoked.
10. The Director makes the final decision and notifies both parties, in writing, by certified mail. The parties are notified of their rights to appeal decisions on discrimination issues only. Decisions on contract administration issues are nonappealable.

### **QUOTAS (§26.43)**

The Department will not use quotas in any way in administering this DBE program.

### **OVERALL ANNUAL GOAL (§26.45)**

#### **Process**

The Department submits its overall annual goal to USDOT on August 1 of each year.

Before establishing the overall annual goal, the Department consults with minority and women's interest groups, DBEs, and non-DBEs, to obtain information concerning the availability of disadvantaged and non-disadvantaged businesses and the effects of discrimination on opportunities for DBEs.

Following this consultation, the Department will publish a notice of the proposed overall annual goal, informing the public that the proposed overall annual goal and its rationale are available for inspection during normal business hours at the Civil Rights Office for 30 days following the date of the notice. The Department and USDOT will accept comments on the goal for 45 days from the date of the notice. This advertisement will run in the ten major newspapers and all tribal newspapers. The goal will also be posted on the Department's web page. Copies will also be provided either electronically via the Departments listserv or in writing to DBE and non-DBE prime contractors, subcontractors, consultants, subconsultants, suppliers, vendors, manufacturers, regular dealers, county, city, and consulting engineers, tribal organizations, other minority and women's interest groups, Department staff, other state and federal agencies, and anyone else requesting it. The notice will include addresses to which comments may be sent and addresses, including offices and web sites, where the proposed overall annual goal may be reviewed.

Our overall annual goal submission to USDOT will include a summary of information and comments received during this public participation process and the Department's responses.

The Department will implement the overall annual goal on October 1 of each year, unless otherwise instructed by USDOT.

#### **FY 2006 DBE GOAL**

In accordance with 49 CFR Part 26, the North Dakota Department of Transportation (NDDOT) calculated the FY 2006 DBE goal at **8.12 percent**.

## STEP 1

Availability of Disadvantaged Business Enterprises (DBEs) is determined from information supplied by all bidders on prime contracts and subcontracts from April 1, 2004, to March 30, 2005. Consultants were melded into the DBE program on February 15, 2005. Therefore, the relevant data for consultants was gathered from February 15, 2005 to March 30, 2005. The information gathered was used to establish the pool of ready, willing, and able DBEs and non-DBEs. There are a total of 336 bidders and quoters on construction projects: 35 DBEs and 301 non-DBEs. A total of 23 consultants bid on consulting projects: 3 DBEs and 20 Non-DBEs (see chart below). A weighted average was developed by determining what percent non-DBEs and DBEs obtained of both the prime contracting, subcontracting, and consultant dollars. **This calculation establishes a base figure for Step 1 of 9.39 percent.**

Period for Data Gathering: Primes, Subs, Suppliers = April 1, 2004 to March 31, 2005  
Consultants = February 17, 2005 – March 31, 2005

	PRIMES BIDDERS	SUBCONTRACTORS OR SUPPLIERS	CONSULTANTS	TOTAL
DBE	7	28	3	38
NON-DBE	83	218	20	321
<b>TOTAL</b>	<b>90</b>	<b>246</b>	<b>23</b>	<b>359</b>

	DOLLARS	PERCENT
PRIME	\$102,201,840	57.24%
SUBCONTRACT	\$68,817,139	38.54%
CONSULTANTS	\$7,542,727	4.22%
<b>TOTAL</b>	<b>\$178,561,706</b>	<b>100.00%</b>

$$\begin{aligned}
 7/90 &= 7.78\% (.5724) = 4.45\% \\
 28/246 &= 11.38\% (.3854) = 4.39\% \\
 3/23 &= 13.04\% (.0422) = 0.55\% \\
 &\quad \quad \quad \mathbf{9.39\%}
 \end{aligned}$$

## STEP 2

The current capacity of DBEs was analyzed based on the volume of work DBEs performed during the past three years.

YEAR	DBE	NON-DBE	TOTAL	PERCENTAGE
FY 2001	\$10,339,657	\$146,291,015	\$156,630,672	6.60%
FY 2002	\$9,088,665	\$158,460,142	\$167,548,807	5.42%
FY 2003	\$13,557,367	\$177,030,545	\$190,587,912	7.11%
FY 2004	\$13,150,084	\$167,755,961	\$180,906,045	7.29%
	<b>\$46,135,773</b>	<b>\$649,537,663</b>	<b>\$695,673,436</b>	

The data provided above covers four fiscal years, FY 2001 through FY 2004. When two or more years of data are available past median participation is determined by eliminating the high and low percent of participation and then averaging the remaining data. Therefore, the percent

of participation for FY 2002 and FY 2004 will be eliminated as they represent the highest and lowest percents of participation. The remaining two years of data for FY 2001 and FY 2003 are 6.60 percent and 7.11 percent respectively. Added together these equal 13.71 percent divided by 2 equal 6.86 percent. The 6.86 percent is then added to the Step 1 figure of 9.39 percent for a total of 16.25 percent divided by 2 equals 8.12 percent. This results in a downward adjustment to the base figure developed in Step 1 to **8.12 percent**.

## **ADJUSTMENTS**

NDDOT also considered available evidence from related fields that affect the opportunities for DBEs to form, grow, and compete. To determine the effects of discrimination on opportunities for DBEs to get financing, bonding, or insurance, we contacted the following:

ND Attorney General's Office  
ND Department of Banking and Financial Institutions  
ND Department of Commerce  
ND Department of Human Services  
ND Small Business Development Center  
ND Office of Management and Budget  
ND University System

We received no information from these sources indicating that adjustment based on this evidence is warranted. No disparity studies have been conducted in the state. Therefore, no adjustment has been made for this factor.

## **BREAKOUT OF ESTIMATED RACE-NEUTRAL AND RACE-CONSCIOUS PARTICIPATION**

The DBE regulations require NDDOT to meet the maximum feasible portion of our overall goal by race-neutral means. This will be achieved in the following way:

1. Using the supportive services newsletter, inform DBEs and non-DBEs about important issues, such as taxes, worker compensation, unemployment insurance, and other available resources for information on basic business topics. Businesses intending to bid as prime contractors use the newsletter to advertise which projects they are bidding on.
2. Provide a supportive services room for DBEs and non-DBEs the day before each bid opening to facilitate the exchange of quotes. The room also provides free access to plans and proposals.
3. Provide the Notice to Bidders list of upcoming projects free of charge to any DBE or non-DBE.
4. Implement a supportive services program to develop and improve immediate and long-term business management, record keeping, financial, and accounting capabilities for DBEs and other small businesses.
5. Ensure distribution of NDDOT's DBE Directory and DBE roster, through print and electronic means, to the widest feasible universe of potential prime contractors and state and federal contracting agencies.

6. Provide basic training to DBEs and non-DBEs on using NDDOT's bid opening process and bidding effectively.

For reporting purposes, race-neutral DBE participation includes but is not necessarily limited to:

1. DBE participation through a prime contract a DBE obtains through customary competitive procurement procedures or through the consultant selection process;
2. DBE participation through a subcontract on a prime contract that does not carry a DBE goal; and
3. DBE participation through a subcontract from a prime contractor that did not consider a firm's DBE status in making the award.

NDDOT believes it will meet the goal of 8.12 percent by using race-neutral and race-conscious means as necessary.

Of the DBE dollars achieved in FY 2004, \$7,890,050 or 60 percent of the 7.29 percent annual goal was achieved through race-neutral means. Any DBE participation achieved in FY 2004, above and beyond the assigned DBE project goals, has been calculated as race-neutral dollars.

The same formula was used to determine both the race-neutral and the race-conscious portions of the proposed FY 2005 DBE goal.

1. 60 percent of the proposed 8.12 percent DBE goal --  
**4.87 percent – will be met by race-neutral means.**
2. 40 percent of the proposed 8.12 percent DBE goal --  
**3.25 percent – will be met by race-conscious means.**

Goals will be set on construction projects to achieve the race-conscious portion of the goal. Consultant participation will be achieved through race-neutral participation.

### **CONTRACT GOALS (\$26.51)**

The Department will use contract goals to meet any portion of the overall goal that it does not project being able to meet using race-neutral means. The Department will establish contract goals only on DOT-assisted contracts that have subcontracting possibilities. We will not necessarily establish a contract goal on every such contract, and the size of contract goals will be adapted to the circumstances of each contract (e.g., type and location of work and availability of DBEs to perform the particular type of work).

Approximately six weeks, prior to each bid opening the DBE Goal Setting Committee will meet to determine which projects should be recommended for DBE project specific goals. The Director will make the final determination which projects will contain project specific goals.

The Department will express its contract goals as a percentage of the federal share of a USDOT-assisted contract.

## **DBE Project Goal Setting Committee**

The DBE Project Goal Setting Committee is made up of the following members:

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Shawn Barney, Transportation Senior Manager, Construction Services Division
- Roger Weigel, Assistant Design Engineer, Design Division
- Errol Behm, Senior Transportation Manager, Local Government Division
- Greg Kolden, Transportation Senior Manager, Construction Services Division

Advisors to the DBE Project Goal Setting Committee are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee.

The Department will bring to the attention of the USDOT any false, fraudulent, or dishonest conduct in connection with the program, so that USDOT can take the steps (e.g., referral to the Department of Justice for criminal prosecution, referral to the USDOT Inspector General, action under suspension and debarment or Program Fraud and Civil Penalties rules) provided in §26.109. The Department will also consider similar action under its own legal authorities, including responsibility determinations in future contracts.

## **GOOD FAITH EFFORTS (§26.53)**

### **Bidders And Quoters Compliance**

The Department treats the bidder's' compliance with good faith efforts requirements as a matter of responsiveness. The DBE race-conscious (**Attachment A**) and race-neutral (**Attachment B**) special provisions requires bidders and quoters to comply with required documentation, regardless of whether they are the successful bidder or quoter. The appropriate DBE special provision is included in all USDOT-assisted contracts except emergency declaration projects and rest area projects.

All bidders must submit a completed Form A, as found in **Attachment A and B**. This form contains:

- The name, address, and phone number of the DBE being used
- The specific bid item or product to be supplied.
- The total dollar value of the work to be performed.

A similar Form A is used in the electronic bidding process.

The proposal submitted by the bidder contains a clause binding the bidder to perform all the special provisions included in the contract. This is considered the bidder's written commitment to use the DBE listed on Form A.

Before the project is awarded to the low bidder, he or she must submit written and signed confirmation from the DBE that it is participating in the contract as provided in the prime

contractor's commitment. This is Form C as found in **Attachment A and B.**  
**Demonstrating Good Faith Efforts On Projects With Assigned Goals**

The bidder's obligation is to make good faith efforts. Bidders can demonstrate that they have done so by meeting the contract goal or documenting good faith efforts as required in the race-conscious special provision. Examples of good faith efforts are found in Appendix A to 49 CFR Part 26.

Before the project is awarded to the low bidder, she or he must submit a written and signed confirmation (Form C) from the DBE that it is participating in the contract as provided in the prime contractor's commitment.

### **DBE Participation Review Committee**

Bidders and quoters have an obligation to make good faith efforts. They can demonstrate that they have done so by documenting their efforts before bid submittal and providing documentation as required by the DBE race-conscious special provision. Various good faith efforts are required at different points in the bidding process as noted in the DBE race-conscious special provision.

The following personnel comprise the Department's DBE Participation Review Committee. They are responsible for making a recommendation to the Director whether a bidder has documented sufficient good faith efforts to be regarded as responsive:

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Shannon Sauer, Division Director, Financial Management Division
- Shawn Barney, Transportation Senior Manager, Construction Services Division
- Jackie Lipp, Civil Rights Officer II, Civil Rights Office
- Greg Kolden, Transportation Senior Manager, Construction Services Division

Advisors to the DBE Participation Review Committee are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee

The Department will ensure that all information is complete and accurate and adequately documents the bidder's good faith efforts before the Department commits to the performance of the contract by the bidder.

### **Administrative Reconsideration**

North Dakota has no commissioners, just the Director. It is Department policy that the Director makes the final decision. Contractors have always had easy access to the Director and Deputy Director for Engineering. These two people are usually readily available and can see a contractor immediately or with only a few minutes' notice. Contractors are aware of and comfortable with this ease of access, and have been for many years.

When a contractor misses any one step in the good faith efforts process, the DBE Participation Review Committee (Committee) makes a preliminary recommendation "not to award." The

process is as follows:

- The contractor is contacted and allowed to comment or make explanations for the record, either in person or through a conference call.
- The contractor is told the Director makes the final decision after considering the recommendations of the Committee and the Deputy Director for Engineering.
- The contractor may choose to visit with the Director and Deputy Director for Engineering, but may not give them any information that has not been given to the Committee.
- The Committee makes a written recommendation to the Director, which includes comments provided by the contractor. The Committee also gives a copy of the written recommendation to the Deputy Director for Engineering.
- The Deputy Director for Engineering also makes a written recommendation to the Director.
- The Director makes the final decision.

### **Unfulfilled Obligations**

The contractor is expected to make good faith efforts throughout the duration of the contract. The Department will use the following process when a contractor or DBE does not fulfill his or her obligations in any of the following situations:

- The contractor believes the DBE is unable to perform the contract, or
- The prime contractor is unable to perform the work committed to be completed by the prime's workforce and equipment at the time of award, or
- The non-DBE whom the prime contractor committed to using at the time of award, is unable to perform, the prime contractor, non-DBE or DBE shall all **immediately** give oral and written notice to the project engineer of the failure to perform, stating the nature of the failure.

If the Department concurs a substitution is warranted the prime contractor will seek, through the Department's Construction Services, and Civil Rights Office and with the assistance of the DBE Supportive Services contractor, a DBE to perform the work instead. All DBEs currently certified in the specific area of work needed to be performed, will be contacted in writing or by phone, and quotes solicited. If available a DBE **will** be selected to perform a dollar value of work, equal to the value of the commitment not achieved unless the contractor can demonstrate the DBE quote is unreasonable, using the bid differential process for quotes available during the replacement process.

The prime contractor is responsible for any additional costs incurred as a result of either the prime contractors failure to fulfill the original commitment or the DBE or non-DBEs failure to perform.

### **Non-Compliance, Failure To Perform And Sanctions**

If the Department determines that a contractor (prime or sub) should be sanctioned for:

- Not paying a DBE in a timely manner,
- Not having a DBE perform the specified dollar amount of work (subject to plan quantity changes), tasks or bid items, or
- For otherwise not fulfilling the requirements of this DBE special provision,

the Department will provide written notice to the contractor informing them of the sanction.

If the Department determines that a DBE should be sanctioned for:

- Failure to perform,
- Failure to pay contract-related bills in a timely manner,
- Failure to perform a commercially useful function,
- Failure to notify the prime contractor orally and in writing if they are unable to perform a commercially useful function, or
- Otherwise not fulfilling the requirements of this DBE special provision

the Department will provide written notice to the DBE informing them of the sanction.

The contractor or the DBE has 14 calendar days, from receipt of the certified notification, to make a written request for a hearing.

If the Department does not receive a written request for a hearing, or if the contractor or DBE does not provide sufficient evidence at the hearing that the provisions have been met, the Department may suspend the contractor or the DBE bidding or quoting privileges and not allow the contractor or the DBE to participate in one or more scheduled bid openings after the date the sanction is imposed.

Grounds for sanctions may include, but are not limited to: repeated instances of failure to perform the contract requirements, repeated instances of late contract-related payments, or documented fraudulent practices.

Further sanctions which may be imposed by the Department for failure on the part of the contractor may include:

- Withhold the contractor's progress payment until the contractor complies with all DBE contract provisions.
- Deduct, from the contractor's progress payments, the dollar amount of DBE participation committed to but not achieved by the contractor.
- Find the contractor in default



- Take other corrective action determined by the Department to be appropriate, or
- Any combination of the above.

### **COUNTING DBE PARTICIPATION (§26.55)**

The Department will count DBE participation toward our overall annual goal as provided in 49 CFR Part 26.55 as noted below:

1. When a DBE participates in a contract, the Department counts only the value of the work actually performed by the DBE toward DBE goals.
  - A. The Department counts the entire amount of that portion of a construction contract (or other contract not covered by paragraph 1B of this section) that is performed by the DBE's own forces. Included are the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).
  - B. The Department counts the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a USDOT-assisted contract, toward DBE goals, if the Department determines the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.
  - C. When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is also a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.
2. When a DBE performs as a participant in a joint venture, the Department counts a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.
3. The Department counts expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.
  - A. A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, the Department must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.
  - B. A DBE does not perform a commercially useful function if its role is limited to that of

an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, the Department must examine similar transactions, particularly those in which DBEs do not participate.

- C. If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, the Department must presume that it is not performing a commercially useful function.
  - D. When a DBE is presumed not to be performing a commercially useful function as provided in paragraph 3C of this section, the DBE may present evidence to rebut this presumption. The Department may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.
  - E. The Department's decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to USDOT.
4. The Department will use the following factors in determining whether a DBE trucking company is performing a commercially useful function:
- A. The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.
  - B. The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
  - C. The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.
  - D. The DBE may lease trucks from another DBE firm, including an owner-operator certified as a DBE. The DBE leasing trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.
  - E. The DBE may also lease trucks from a non-DBE firm, including from an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit for the total value of the transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract. Additional participation by non-DBE lessees receives credit only for the fee or commission it receives as a result of the lease arrangement. If a recipient chooses this approach, it must obtain written consent from the appropriate Department Operating Administration.

*Example to this paragraph (d)(5):* DBE Firm X uses two of its own trucks on a contract. It leases two trucks from DBE Firm Y and six trucks from non-DBE Firm Z. DBE credit would be awarded for the total value of transportation services provided by Firm X and Firm Y, and may also be awarded for the total value of transportation

services provided by four of the six trucks provided by Firm Z. In all, full credit would be allowed for the participation of eight trucks. With respect to the other two trucks provided by Firm Z, DBE credit could be awarded only for the fees or commissions pertaining to those trucks Firm X receives as a result of the lease with Firm Z.

- F. For purposes of this paragraph (4), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.
5. The Department counts expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:
- A. If the materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals.
    - (1) For purposes of this paragraph (5A), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.
  - B. If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.
    - (1) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.
      - a. To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the purchase and sale or lease of the products in question.
      - b. A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (5B[1]) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.
      - c. Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (5B).
  - C. With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site,

toward DBE goals, if the Department determines the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

6. If a firm is not currently certified as a DBE in accordance with the standards of subpart D of 49 CFR Part 26 at the time of the execution of the contract, the Department does not count the firm's participation toward any DBE goals, except as provided for in §26.87(i).
7. The Department does not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward the Department's overall annual goal.
8. The Department does not count the participation of a DBE subcontractor toward a contractor's final compliance with its DBE obligations on a contract until the amount being counted has actually been paid to the DBE.

### **UNIFIED CERTIFICATION PROGRAM (§26.61)**

Currently the Department, under its unified certification program (UCP), makes all certification decisions on behalf of FHWA, FAA, and FTA recipients, which it will continue to do. Certification decisions under the UCP will be binding on all recipients in North Dakota. An applicant is only required to apply once for DBE certification and it will be honored by all USDOT recipients in North Dakota. For the past 20 years, the Department has been the sole organization, statewide, who has performed DBE certifications. During that time the Department, on rare occasions, would receive an application from an applicant whose field of expertise was directed solely at FTA or FAA activities. In those instances, the Department handled the entire certification process, free-of-charge, for our sister agencies. This procedure will continue in the future.

Under the UCP the DBE certification standards of Subpart D of part 26, and the DBE certification procedures of Subpart E of Part 26, and Part 23 for airport concessions, are used to determine the eligibility of firms to participate as DBEs in USDOT-assisted contracts. To be certified as a DBE, a firm must meet all certification eligibility standards. Certification decisions will be based on the facts as a whole.

The unified certification program will cooperate fully with oversight, review, and monitoring activities of the USDOT and its operating administrations. The Department will implement USDOT directives and guidance concerning certification matters. The Department will carry out all obligations with respect to certification and nondiscrimination requirements contained in 49 CFR Part 26.

The Department certifies the eligibility of Disadvantaged Business Enterprises (DBE) firms for purposes of this program. The Department certifies those firms that provide services and/or products related to any aspect of the development, construction, maintenance, and operation of a transportation system. It is the responsibility of the applicant to provide the necessary information as requested by the Department. The burden of proof of eligibility within the program is upon the applicant, not the Department. Prior certification by another state or agency does not ensure certification by the Department.

Only firms certified by the Department at the time of the execution of the contract can be counted for participation toward meeting any DBE goals except as provided for in 49 CFR

Part 26.87.

An applicant is defined as one who submits an application for DBE certification to the Department.

### **Staffing**

The DBE Liaison Officer has a staff of two Civil Rights Officer IIs (CROII) and an Administrative Assistant II (AAll) assigned to the DBE program as part of their duties. One CROII is a member of the DBE Unified Certification Board, the DBE Goal Setting Committee, and DBE Participation Review Committee. Both CROII's can process DBE applications, compile data for the DBE Directory, update the DBE Roster, conduct DBE home office reviews, conduct and write the annual review of the supportive services contractor, and prepare statistical data for various reports. The AAll gathers data relative to DBE goal setting, DBE participation, the bidders list, and good faith efforts review.

Should an applicant apply for certification as a concessionaire, the ND Aeronautics Commissioner has designated Mark Holzer, Transportation Planner, ND Aeronautics Commission, to serve on the DBE Unified Certification Board. The ND Aeronautics Commission designee will serve in place of the representative from the Construction Services Division.

New members to the DBE Unified Certification Board are provided training as required. Generally they sit in as an observer for approximately 6 months before they become a voting member.

Because there is so little activity in either the FTA or FAA arena, all costs to implement the unified certification program have been, and will continue to be, included in the Civil Rights Office annual budget. The ND Aeronautics Commission designee will serve on the DBE Unified Certification Board at no cost to the Department.

### **DBE Unified Certification Board**

The DBE Unified Certification Board is made up of any three of the following members:

- Deb Igoe, Chair, (DBE Liaison Officer), Civil Rights Office
- Lynn Shannon-Gall, Account Technician II, Financial Management Division
- Jackie Lipp, Civil Rights Officer II, Civil Rights Office
- Shawn Barney, Transportation Senior Manager, Construction Services Division
- Greg Kolden, Transportation Senior Manager, Construction Services Division.
- Mark Holzer, Aviation Planner, North Dakota Aeronautics Commission

Advisors to the DBE Unified Certification Board are:

- Jim Laducer, President, Laducer & Associates, Inc., (the Department's current DBE supportive services contractor), or his designee
- Russ Hanson, Executive Vice President, Associated General Contractors of North Dakota, or his designee

The recording secretary is Marlene Larson, Civil Rights Officer II, Civil Rights Office.

## **DBE DIRECTORY (§26.81, §26.31 )**

Under the Department's unified certification program (UCP), the Department's Civil Rights Office maintains a DBE Directory (**Attachment H**) identifying all firms certified as DBEs under the UCP. The Directory lists the firm's name, owner's name, address, phone number, type of DBE designation, year formed, whether bonded, whether insured, area of work, labor force, equipment, and the type of work the DBE firm has been certified to perform.

The Directory is published in hard copy and distributed on January 1 of each year. It is also located on our Department website at: [www.state.nd.us/dot/bidinfo.html](http://www.state.nd.us/dot/bidinfo.html) The electronic version is updated by including additions, deletions, and other changes as they are made, approximately 9-10 times per year.

The Directory is made available, electronically or by hardcopy, to all DBE and non-DBE prime contractors, subcontractors, consultants, subconsultants, suppliers, vendors, manufacturers, regular dealers, county, city, and consulting engineers, tribal organizations, other minority and women's interest groups, Department staff, other state and federal agencies, and anyone else requesting it.

The Department also publishes a DBE Roster (**Attachment I**) thirty days prior to each bid opening. An update to the DBE Roster is available 5 days before each bid opening. Both the Directory and the Roster are also located on the Department's web page on the Internet at [www.state.nd.us/dot/bidinfo.html](http://www.state.nd.us/dot/bidinfo.html) Copies of the DBE Roster are included in each qualified bidder's package.

## **CERTIFICATION DECISIONS (§26.83)**

Firms wishing to participate as DBE contractors, subcontractors, manufacturers, regular dealers, joint ventures, or mentor-protégées in any project using federal funds from the FHWA, FTA or FAA must be certified by the ND Unified Certification Program. To this end, the Department has established the following procedures to be followed in the certification of these firms.

Each business (including the DBE partner in a joint venture) wishing to participate as a DBE must complete and submit the DBE Uniform Certification Application (SFN 18787) (**Attachment M**). Each entity wishing to participate as a DBE joint venture must, in addition, complete and submit the Application for Determining Joint Venture Eligibility (SFN 6805) (**Attachment N**). SBA-certified firms may provide copies of application for certification documentation provided to the SBA in lieu of completing the DBE Uniform Certification Application. The firm will also be required to complete the other application steps prior to a certification decision being made by the Department. Additional information will be requested as necessary. Airport concession applications will be handled in the same manner as all other applications.

Applicants wishing to apply for DBE status or DBE joint venture eligibility may either call, write, or email the Department at Civil Rights Office, North Dakota Department of Transportation, 608 East Boulevard Avenue, Bismarck, ND 58505-0700, or [digoe@state.nd.us](mailto:digoe@state.nd.us), phone (701) 328-2576, cell (701) 527-8834 or fax (701) 328-1965.

In-state applicants receive a telephone call and/or personal visit from the Department's

supportive services contractor offering assistance in completing the application form or answering any questions regarding the certification process.

Applicants are mailed the DBE Uniform Certification Application with a due date for the information to be returned for consideration at the next DBE Unified Certification Board meeting. If no response is received by that date, the Department mails a second letter with a revised due date of thirty calendar days. The second letter informs the applicant that if no response is received within the thirty calendar days, certification will be denied for failure to respond.

The application is to be signed by all owners of the business entity. The owners must attest to the accuracy and truthfulness of the information on the application form. This is done in the form of an affidavit sworn to by the owners before a person who is authorized by state law to administer oaths. The firm seeking certification must submit the required application to the Department's Civil Rights Office.

Items reviewed by the DBE Unified Certification Board may include, but are not limited to:

- Business status;
- Annual gross receipts;
- Affiliates of the firm;
- Ownership;
- Expertise;
- Compensation;
- Day-to-day management and control;
- Social and economic disadvantage status of applicant(s);
- Disadvantaged group membership;
- Independence of the firm;
- SBA 8(a) and SDB status;
- Loan agreements (past and present);
- Ownership titles, registration cards, and current license numbers for vehicles and equipment, where applicable;
- Equipment leases and property lease agreements;
- Partnership agreements;
- Certificate of incorporation, articles of incorporation, and corporate by-laws;
- Minutes of Board of Directors and Stockholders meetings;
- Proof of investment;
- Executed contracts;
- Executed bond agreements;
- Executed purchase orders;
- Contractor's license, if available;
- Executed Affidavit of Certification (SFN 53866);
- Birth certificates indicating race and gender, tribal enrollment numbers, drivers licenses, naturalization papers, etc;
- Income tax returns, including all schedules and W-2 forms, for the firm and each owner for the previous three years;
- Canceled checks (front and back);
- Documented evidence of discrimination in credit, bonding, employment, education; contracting opportunities, and membership in business organizations;
- Resumes for each principal stockholder or owner;
- Stock certificates;
- Stock transfer ledgers;

- Work history of the firm;
- Insurance policies;
- Record of the on-site review or project-site review;
- Answers to the question on the DBE Uniform Certification Application;
- Personal Financial Statement (SFN 52157);
- Sworn affidavits;
- Answers to questions asked at the DBE Unified Certification Board meeting.

On-site home-office reviews are conducted on all in-state applicants prior to their oral interview with the DBE Unified Certification Board. Out-of-state applicant's home office reviews are requested from their home-state Departments of Transportation or the Small Business Administration office. Applicants not certified in their home state are encouraged to do so before applying for certification in North Dakota. However, out-of-state applicants that wish to be certified in North Dakota and not their home state are reviewed on a case-by-case basis.

### **Oral Interview**

DBE Uniform Certification Applications and Applications for Determining Joint Venture Eligibility are reviewed by the DBE Unified Certification Board (Board). All applicants applying for certification must appear before the Board for an oral interview. If this proves to be a hardship for an applicant, the Board will make other arrangements for the oral interview on a case-by-case basis.

Interviews are conducted with the applicant(s) making up the 51 percent ownership. Oral interviews are scheduled approximately ten working days prior to each bid opening. The questions asked of the applicant(s) concern ownership, financial arrangements, day-to-day management and control, expertise in the area(s) in which the applicant is seeking certification, or any other questions the Board deems appropriate. All oral interviews are recorded.

In instances where the applicant is an airport concessionaire, the representative from the ND Aeronautics Commission will ask the expertise questions in place of the Construction Services representative during the oral interview.

The Board makes a recommendation to the Director, Office of Operations, to either certify or deny certification of an applicant based on the information provided, the oral interview, 49 CFR Part 26, and the Department's DBE program. A copy of the application is forwarded to the Director, Office of Operations, with the board's recommendation. The Director, Office of Operations, makes the decision to either certify or deny certification to the applicant(s).

Applicants determined to be eligible for certification are notified by phone and in writing, by certified mail. The Department makes all necessary and reasonable efforts to expedite the certification process. Decisions on applications for certification are made within 90 days of receiving all of the required information from the applicant. Where applicable FTA and FAA recipients will be notified of certification actions for applicants in their field. All certification decisions by the UCP are binding on all Department recipients.

The Department may make additional on-site reviews or project-site reviews at random to determine the continuing eligibility of a DBE firm.

The Department safeguards from disclosure to unauthorized person information gathered as part of the certification process that may reasonably be regarded a proprietary or other



confidential business information, consistent with applicable federal, state, and local law. The Department returns all tax returns, by certified mail, within ten working days of review by the DBE Unified Certification Board, unless the firm has been determined to be ineligible for certification.

### **Notice Of Changes And Annual Affirmation Of DBE Program Eligibility**

DBE firms are required to notify the Department in a written affidavit, of any change in circumstances affecting its ability to meet size, disadvantaged status, ownership or control criteria of 49 CFR Parts 23 and 26 or of any material changes in the information provided with the specific DBE's application for certification.

DBE firms are required to submit a Notice of Changes and Annual Affirmation of DBE Program Eligibility (SFN 52158) (**Attachment O**) or affidavit of no change, to the Department on the anniversary date of certification (annually). The affidavit must comply with the requirements of 49 CFR 26.83(j). The text of this affidavit is the following:

*I swear (or affirm) that there have been no changes in the circumstances of [specific name of DBE firm] affecting its ability to meet the size, disadvantaged status, ownership, or control requirements of 49 CFR Parts 23 and 26. There have been no material changes in the information provided with [specific name of DBE firm]'s application for certification, except for any changes about which you have provided written notice to the North Dakota Department of Transportation under §26.83(i). [Specific name of DBE firm] meets Small Business Administration (SBA) criteria for being a small business concern and its average annual gross receipts (as defined by SBA rules) over the firm's previous three fiscal years do not exceed \$17.4 million.*

DBE firms are required to submit documentation of the firm's size and gross receipts.

### **SBA MEMORANDUM OF UNDERSTANDING (§26.84)**

When a Small Business Administration (SBA) SBA-certified firm applies for certification pursuant to the USDOT/SBA MOU, the Department will accept the certification application and forms submitted by an applicant to the SBA for either the 8(a) or SDB program, in lieu of requiring the applicant to complete the Department's own application forms. The applicant may submit the package directly, or may request that the SBA forward the package to the Department. Pursuant to the MOU, the SBA is required to forward the package within thirty days.

If necessary, the Department may request additional relevant information from the SBA. The SBA is required to provide this additional material within forty-five days of the Department's written request.

Before certifying an applicant based on its 8(a) or SDB certification application, the Department will conduct the on-site home office review of in-state applicants and an oral interview with both in-state and out-of-state applicants. For out-of-state applicants, if the SBA conducted an on-site home office review, the Department may rely on the SBA's report of the on-site home office review. In connection with either of these reviews, the Department may also request additional relevant information from the applicant. As is required with all DBE applicants SBA applicants must participate in an oral interview with the Department's DBE Unified Certification Board.

The Department will not process an application for certification from an SBA-certified firm having its principal place of business located outside of the state of North Dakota unless there is report of a "home state" SBA on-site review on which the Department may rely.

Unless the Department determines, based on the on-site home office review and information obtained in connection with it, the application, and the oral interview, that the applicant does not meet the eligibility requirements of Part 26 Subpart D, the Department will certify the applicant.

The Department will only process an application for certification from an SBA-certified firm if the firm provides products or services that the Department uses in our USDOT-assisted programs or airport concessions.

Upon receipt of a signed, written request from a DBE-certified firm, the Department will transfer to the SBA a copy of the firm's application package. The Department will transfer this information within thirty days of receipt of the request.

If the SBA submits a written request to the Department for additional materials (e.g., the report of the on-site review) the Department must provide a copy of the requested material to the SBA within forty-five days of the additional request.

The Department will provide appropriate assistance to SBA-certified firms, including providing information pertaining to the DBE application process, filing locations, required documentation, and status of applications.

### **DENIAL OF INITIAL REQUEST FOR CERTIFICATION (§26.86)**

Applicants who are denied initial request for certification are notified in writing, by certified mail, including the reason(s) for the denial specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

When the Department denies DBE certification to a firm certified by the SBA, the Department must notify the SBA in writing including the reasons for the denial.

Applicants are also advised of their right, as provided for in 49 CFR Part 26.89, to appeal to the U. S. Department of Transportation.

The determination of ineligibility of certification is effective immediately and remains in effect until and unless the USDOT makes a determination reversing the Department's action.

Applicants may correct identified deficiencies, submit a new DBE Uniform Certification Application, and reappear at the next scheduled meeting of the DBE Unified Certification Board for an oral interview.

### **REMOVING DBE ELIGIBILITY (§26.87)**

#### **Third Party-initiated Ineligibility Complaints**

Any person may file a written complaint with the Department alleging that a currently-certified DBE is ineligible and specifying the alleged reasons why the firm is ineligible. The Department is not required to accept a general allegation that a firm is ineligible or an anonymous complaint.

The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not continue to be certified. Confidentiality of complainants' identities will be protected as required by §26.109(b).

The Department must review its records concerning the firm, any material provided by the firm and the complainant, and other available information. The Department may request additional information from the firm or conduct any other investigation deemed necessary.

If the Department determines, based on this review, that there is reasonable cause to believe that the firm is ineligible, the Department must provide written notice to the firm that the Department proposes to find the firm ineligible, setting forth the reasons for the proposed determination. If the Department determines that such reasonable cause does not exist, the Department must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

### **Department-initiated Proceedings**

If, based on notification by the firm of a change in its circumstances or other information that comes to the Department's attention, the Department determines that there is reasonable cause to believe that a currently certified firm is ineligible, the Department must provide written notice to the firm that it proposes to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

### **USDOT Directive To Initiate Proceeding**

If the USDOT determines that information in the Department's certification records, or other information available to the USDOT, provides reasonable cause to believe that a firm the Department certified does not meet the eligibility criteria of 49 CFR Parts 23 and 26, the USDOT may direct the Department to initiate a proceeding to remove the firm's certification.

The USDOT must provide the Department and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

The Department must immediately commence and prosecute a proceeding to remove eligibility.

### **Hearing**

When the Department notifies a firm that there is reasonable cause to remove its eligibility, the Department must give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

In such a proceeding, the Department bears the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of 49 CFR Part 23 and 26.

The Department must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to USDOT under §26.89, the Department must provide a transcript of the hearing to USDOT and, on request, to the firm. The Department must retain the original record of the

hearing. The Department may charge the firm only for the cost of copying the record.

The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, the Department bears the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as the Department would during a hearing.

### **Separation Of Functions**

The Department must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

The decision maker must be an individual who is knowledgeable about the certification requirements of the Department's DBE program and 49 CFR Parts 23 and 26.

### **Grounds For Decision**

The Department must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. The Department may base such a decision only on one or more of the following:

- Changes in the firm's circumstances since the certification of the firm by the Department that render the firm unable to meet the eligibility standards of 49 CFR Part 26;
- Information or evidence not available to the Department at the time the firm was certified;
- Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;
- A change in the certification standards or requirements of the USDOT since the Department certified the firm; or
- A documented finding that the Department's determination to certify the firm was factually erroneous.

### **Notice Of Decision**

Following its decision, the Department must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of the Department's decision and of the availability of an appeal to the US Department of Transportation under §26.89. The Department must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed the Department to initiate the proceeding.

When the Department decertifies a DBE firm certified by the SBA, the Department will notify the SBA in writing. The notification will include the reason for the denial.

### **Status Of The Firm During Proceedings**

A firm remains an eligible DBE during the pendency of the Department's proceeding to remove its eligibility.

The firm does not become ineligible until the issuance of the notice provided for in this section.

### **Effects Of Removal Of Eligibility**

When the Department removes a firm's eligibility, the Department must take the following action:

- When a prime contractor has made a commitment to using the ineligible firm, or the Department has made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before the Department issues the decertification notice, the ineligible firm does not count toward the contract goal or overall [aspirational] goal. The Department must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to the Department that it has made a good faith effort to do so.
- If a prime contractor has executed a subcontract with the firm before the Department has notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where the Department has let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after the Department issued the notice of its ineligibility shall not count toward the Department's overall [aspirational] goal, but may count toward the contract goal.
- Exception: If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, the Department may continue to count its participation on that contract toward overall [aspirational] and contract goals.

### **Availability Of Appeal**

When the Department makes an administratively final removal of a firm's eligibility, the firm may appeal the removal to the US Department of Transportation under §26.89.

### **Appeal To USDOT**

A firm may immediately appeal a determination of ineligibility of certification to the USDOT without going through the Department's administrative reconsideration procedure.

Further instructions are found in the Certification Appeal To The USDOT §26.89.

## **CERTIFICATION APPEAL TO THE USDOT (§26.89)**

### **Filing An Appeal**

A firm which is denied certification or whose eligibility is removed by the Department, including SBA-certified firms applying pursuant to the USDOT/SBA MOU, may make an administrative

appeal to the USDOT.

Complainants in an ineligibility complaint to the Department, including those directed by the Federal Highway Administration (FHWA), Federal Transit Administration (FTA), or the Federal Aviation Administration (FAA) in the circumstances provided in §26.87(c)), may appeal to the USDOT if the Department does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

Send appeals to the following address: U.S. Department of Transportation, Office of Civil Rights, 400 7th Street, S.W., Room 5414, Washington, D.C. 20590. Pending the USDOT's decision in the matter, the Department's decision remains in effect. The USDOT does not stay the effect of the Department's decision while it is considering an appeal.

To file an appeal, a letter must be sent to the USDOT within 90 days of the date of the Department's final decision, containing information and arguments concerning why their decision should be reversed. The USDOT may accept an appeal filed later than 90 days after the date of the decision if the USDOT determines that there was good cause for the late filing of the appeal.

A firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, letter **must** state, in its appeal letter, the name and address of any other recipient (local, state, or federal transportation agency), which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under §26.109(c).

When it receives an appeal, the USDOT requests a copy of the recipient's complete administrative record in the matter. The Department will provide the administrative record, including a hearing transcript, within 20 days of the USDOT's request. The USDOT may extend this time period on the basis of the Department's showing of good cause. To facilitate the USDOT's review of the Department's decision, the Department will ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to the Department to be corrected immediately. If an appeal is brought concerning the Department's certification decision concerning a firm, and the Department relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

The USDOT makes its decision based solely on the entire administrative record. The USDOT does not make a de novo review of the matter and does not conduct a hearing. The USDOT may supplement the administrative record by adding relevant information made available by the USDOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a USDOT operating administration or other appropriate USDOT office; a recipient; or a firm or other private party.

As a recipient, when the Department provides supplementary information to the USDOT, the Department shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The USDOT makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

The USDOT affirms the Department's decision unless it determines, based on the entire administrative record, that the Department's decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of 49 CFR Part 26 concerning certification.

If the USDOT determines, after reviewing the entire administrative record, that the Department's decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of 49 CFR Parts 23 and 26 concerning certification, the USDOT reverses the Department's decision and directs the Department to certify the firm or remove its eligibility, as appropriate. The Department ***must*** take the action directed by the USDOT's decision immediately upon receiving written notice of it.

The USDOT is not required to reverse the Department's decision if the USDOT determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the USDOT may remand the record to the Department with instructions seeking clarification or augmentation of the record before making a finding. The USDOT may also remand a case to the Department for further proceedings consistent with USDOT instructions concerning the proper application of the provisions of 49 CFR Parts 23 and 26.

The USDOT does not uphold the decision based on grounds not specified in the Department's decision.

The USDOT's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

The USDOT provides written notice of its decision to the Department, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding. The notice includes the reasons for the USDOT's decision, including specific references to the evidence in the record that supports each reason for the decision.

The USDOT's policy is to make its decision within 180 days of receiving the complete administrative record. If the USDOT does not make its decision within this period, the USDOT provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

All decisions made pursuant to 49 CFR Part 26.85 administratively final, and are not subject to petitions for reconsideration.

#### **ACTIONS TAKEN FOLLOWING USDOT CERTIFICATION APPEAL DECISIONS (§26.91)**

If the Department is the recipient from whose action an appeal under §26.89 is taken, the decision is binding on the Department which includes all recipients in North Dakota pursuant to the UCP. It is not binding on recipients not subject to the UCP (i.e., recipients or UCPs in other states).

If Department is the recipient to which a USDOT determination under §26.89 is applicable, the following action *must* be taken:

- If the USDOT determines that the Department erroneously certified a firm, the Department *must* remove the firm's eligibility on receipt of the determination, without further proceedings on its part. Effective on the date of the Department's receipt of the USDOT's determination, the consequences of a removal of eligibility set forth in §26.87 will take effect.
- If the USDOT determines that the Department erroneously failed to find reasonable cause to remove the firm's eligibility, the Department *must* expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in §26.87.
- If the USDOT determines that the Department erroneously declined to certify or removed the eligibility of the firm, the Department *must* certify the firm, effective on the date of the Department's receipt of the written notice of USDOT's determination.
- If the USDOT determines that the Department erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, the Department *must* take appropriate corrective action as determined by the USDOT
- If the USDOT affirms the Department's determination, no further action is necessary.

**Attachments:**

- A. DBE Race-Conscious Special Provision
- B. DBE Race-Neutral Special Provision
- C. Bidders List Survey
- D. Record of DBE Project Payments (SFN 53665)
- E. Record of Consultant Project Payments (SFN 54428)
- F. North Dakota Department of Transportation Organizational Chart
- G. Prompt Payment Special Provision
- H. DBE Directory
- I. DBE Roster
- J. Prime Contractors Request to Sublet (SFN 5682)
- K. DBE Participation Certification (SFN 14268)
- L. Title VI Complaint Form and Procedure
- M. DBE Uniform Certification Application (SFN 18787)
- N. Application for Determining Joint Venture Eligibility (SFN 6805)
- O. Notice of Changes and Annual Affirmation of DBE Program Eligibility (SFN 52158)



## **ATTACHMENT A**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM RACE-CONSCIOUS**

To access Special Provision: Disadvantaged Business Enterprise Program (Race-conscious), click on the following and select a published date from the drop-down box in the left column:

<http://www.state.nd.us/dot/dbebidinfo.html>.

## **ATTACHMENT B**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION: DISADVANTAGED BUSINESS ENTERPRISE PROGRAM RACE-NEUTRAL**

To access Special Provision: Disadvantaged Business Enterprise Program (Race-neutral), click on the following and select a published date from the drop-down box in the left column:

<http://www.state.nd.us/dot/dbebidinfo.html>.

## **ATTACHMENT C**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION BIDDERS' LIST INFORMATION**

To access Bidders' List Information, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/bidderslistsurvey.pdf>.

## **ATTACHMENT D**

### **RECORD OF DBE PROJECT PAYMENTS**

North Dakota Department of Transportation, Civil Rights Office  
SFN 53664 (12-2003)

To access SFN 53664, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/sfn53664.pdf>.

## **ATTACHMENT E**

### **RECORD OF CONSULTANT PROJECT PAYMENTS**

North Dakota Department of Transportation, Civil Rights Office  
SFN 54428 (08-2005)

To access SFN 54428, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/sfn54428.pdf>.

## **ATTACHMENT F**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION ORGANIZATION CHART**

June 15, 2005

To access the current North Dakota Department of Transportation Organization Chart, click on the following:

<http://www.state.nd.us/dot/docs/nddot.pdf>.

## **ATTACHMENT G**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION SPECIAL PROVISION: PROMPT PAYMENT AND RETAINAGE**

To access Special Provision: Prompt Payment and Retainage, click on the following and select a published date from the drop-down box in the left column:

<http://www.state.nd.us/dot/dbebidinfo.html>.

## ATTACHMENT H

### NORTH DAKOTA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE (DBE) DIRECTORY

To access the current edition of the DBE Directory, click on the following, then click on DBE Directory in the right column:

<http://www.state.nd.us/dot/dbebidinfo.html>:



## ATTACHMENT I

### NORTH DAKOTA DEPARTMENT OF TRANSPORTATION DBE ROSTER

To access the current edition of the DBE Roster, click on the following, then click on DBE Firm Roster ... or DBE Consultant Roster ... in the right column:

<http://www.state.nd.us/dot/dbebidinfo.html>:

## **ATTACHMENT J**

### **PRIME CONTRACTOR'S REQUEST TO SUBLET**

North Dakota Department of Transportation, Construction  
SFN 5682 (Rev. 08-2001)

To access SFN 5682, click on the following:

<http://www.state.nd.us/dot/docs/construction/sfn05682.pdf>.

## **ATTACHMENT K**

### **DBE PARTICIPATION CERTIFICATION**

North Dakota Department of Transportation, Construction  
SFN 14268b (Rev. 2-2001)

To access SFN 14268b, click on the following and go to Page 2:

<http://www.state.nd.us/dot/docs/construction/SFN14268.pdf>.

## **ATTACHMENT L**

### **TITLE VI COMPLAINT FORM**

North Dakota Department of Transportation, Civil Rights Office  
SFN 51795 (Rev. 02-2001)

To access SFN 51795, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/sfn51795.pdf>.

To access the Title VI Complaint Procedure, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/titlevicomplaintprocedure.pdf>.

## **ATTACHMENT M**

### **NORTH DAKOTA DEPARTMENT OF TRANSPORTATION DISADVANTAGED BUSINESS ENTERPRISE PROGRAM 49 CFR PART 26 UNIFORM CERTIFICATION APPLICATION**

To access the Uniform Certification Application, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/DBEuniformcertification.pdf>.

## **ATTACHMENT N**

### **APPLICATION FOR DETERMINING JOINT VENTURE ELIGIBILITY**

North Dakota Department of Transportation, Civil Rights Office  
SFN 6805 (Rev. 10-2001)

To access SFN 6805, click on the following:

<http://www.state.nd.us/dot/docs/civilrights/sfn06805.pdf>.

## **ATTACHMENT O**

### **NOTICE OF CHANGES AND ANNUAL AFFIRMATION OF DBE PROGRAM ELIGIBILITY**

North Dakota Department of Transportation, Civil Rights Office  
SFN 52158 (Rev. 03-2005)

To access SFN 52158, click on the following:

[http://www.state.nd.us/dot/docs/civilrights/sfn52158.pdf.](http://www.state.nd.us/dot/docs/civilrights/sfn52158.pdf)